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equally in the security.[10] Only where the mortgagees were purchasers for value of a legal interest without notice of the provision in the bonds should they come ahead of the bondholders.

TITLE TO SEASHORE AND SOIL UNDER NAVIGABLE RIVERS AND STREAMS. — By a rule of international law every independent nation is considered to have territorial property in and jurisdiction over the seas which wash its shores within a limit of three miles from low-water mark on the shore.[1] Moreover, title to the soil of all navigable tidal rivers as far inland as the tide ebbs and flows, and of all estuaries and arms of the sea, vests in the sovereign,[2] on the ground that such streams partake of the nature of the sea and are branches of it as far as it flows.[3] But inlets of the sea and small tidal creeks which are not susceptible of navigation belong to the owners of the lands along their banks.[4] In England, whatever may be the King's right to-day, it was early recognized that he had the right to make a grant of the soil under tidewaters.[5] The States are the successors to the rights of the English King in this country, and in the absence of any constitutional inhibition there is no reason why they cannot through their legislatures make similar grants.[6] In order to pass the soil under such waters, however, express words must be used.[7]

At common law, title to the seashore [8] on tidewaters was *prima facie* in the King. This was the opinion of Lord Hale [9] and the modern English cases have accepted his view.[10] The majority of American juris-

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[10] The right that the bondholders acquire when the contingency happens would seem to be the equitable ownership of the security title.

[1] Gann *v.* The Free Fishers of Whitstable, 11 H. L. Cas. 192 (1865); Manchester *v.* Mass., 139 U. S. 240 (1891).

[2] Gann *v.* The Free Fishers of Whitstable, *supra;* Townsend *v.* Brown, 24 N. J. L. 80 (1853); Hoboken *v.* Penn. R. R. Co., 124 U. S. 656 (1888).

[3] Royal Fishery of the Banne, Davies Rep. 149 (1610).

[4] See Commonwealth *v.* Charlestown, 1 Pick. (Mass.) 180 (1822); Rowe *et al. v.* Granite Bridge Corp., 21 *Idem.* 344 (1838).

[5] The Free Fishers of Whitstable *v.* Gann, 11 C. B. (N. S.) 387 (1861). The corporation of New York City received under royal charters title to lands under water along the East and North Rivers to the extent of four hundred feet from the line of low-water mark. Furman *v.* New York, 10 N. Y. 567 (1853).

[6] Gould *v.* The Hudson River R. Co., 6 N. Y. 522 (1852); Langdon *v.* New York, 93 N. Y. 129 (1883).

[7] Middletown *v.* Sage, 8 Conn. 221 (1830); Wright *v.* Seymour, 69 Cal. 122, 10 Pac. 323 (1886).

[8] The seashore is "that space of land on the border of the sea which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space of land between high and low water mark." 2 BOUVIER'S LAW DICT. 963. High and low water marks are the limits within which the tide ordinarily ebbs and flows. Atty.-Genl. *v.* Chambers, 4 De G., M. & G. 206 (1854); Church *v.* Meeker, 34 Conn. 421 (1867).

[9] "The shore . . . doth *prima facie* and of common right belong to the king." HALE, DE JURE MARIS, c. 4.

[10] Scratton *v.* Brown, 4 B. & C. 485 (1825); Le Strange *v.* Rowe, 4 Fost. & Fin. 1048 (1866); Pearce *v.* Bunting, L. R. 2 Q. B. D. 360 (1896). The King has the right to transfer title to the seashore by grant, subject to the public easements of navigation and fishing. Atty.-Genl. *v.* Parmeter, 10 Price, 378 (1822); Parker *v.* Elliott, 1 U. C. C. P. 470 (1851).

dictions have adopted the English rule, and consequently title to the shore is *prima facie* in the state, and the riparian owners hold only to high-water mark.[11] A minority of jurisdictions, however, give the riparian proprietor title as far as the low-water mark.[12] It is submitted that the latter rule is the more desirable. The shore is of little practical value to the sovereign.[13] The owners of lands along the shore alone are ordinarily in a position to make a valuable use of the shore and to construct improvements on it.[14] Their access to the sea should not be jeopardized by the possible presence in a grant of words open to a construction which would convey the shore to a third party. Lord Hale himself [15] and the English courts since his time have been compelled to acknowledge the weight of these considerations. The result has been that rather

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[11] Long Beach Land & Water Co. *v.* Richardson, 70 Cal. 206, 11 Pac. 695 (1886); Hess *v.* Muir, 65 Md. 586, 6 Atl. 673 (1886); Parker *v.* The West Coast Packing Co., 17 Ore. 510, 21 Pac. 822 (1889); Boulo *v.* New Orleans, Mobile & Tex. R. Co., 55 Ala. 480 (1876); Bailey *v.* Burges *et al.*, 11 R. I. 330 (1876); Simons *v.* French, 25 Conn. 346 (1856); The N. J. Zinc & Iron Co. *v.* The Morris Canal & Banking Co., 44 N. J. Eq. 398, 15 Atl. 227 (1888); Roberts *v.* Baumgarten, 110 N. Y. 380, 18 N. E. 96 (1888); Eisenbach *v.* Hatfield, 2 Wash. St. 236, 26 Pac. 539 (1891); Galveston City Surf Bathing Co. *v.* Heidenheimer, 63 Tex. 559 (1885).

Grants made by the United States from public lands on tidewaters in the Territories carry only to high-water mark. The disposition of the soil below that point is left to the states when they are organized and admitted into the Union. Shively *v.* Bowlby, 152 U. S. 1 (1893). See Hardin *v.* Jordan, 140 U. S. 371, 381 (1891).

The state, like the King, may grant away its title to the shore. Ward *v.* Mulford, 32 Cal. 365 (1867); Galveston *v.* Menard, 23 Tex. 349 (1859). In New Jersey the riparian owners may reclaim the shore by filling it up, and if the state fails to intervene, they thereby acquire title to the land reclaimed. By the acquiescence of the legislature the state is divested of its title and may not thereafter grant the shore to a third party. Gough *v.* Bell, 22 N. J. L. 441 (1850). By a statute in 1856 the State of Florida divested itself of all title and interest in lands covered by water upon navigable streams, bays, and harbors, as far as the edge of the channel, and vested the same in the riparian proprietors. Geiger *et al. v.* Filor, 8 Fla. 325 (1859). A similar statute in Virginia extended the title of the riparian owners on bays, rivers, creeks, and shores of the sea to the line of low-water mark. McDonald *v.* Whitehurst, 47 Fed. 757 (1891).

[12] Palmer *v.* Farrell, 129 Pa. 162, 18 Atl. 761 (1889); The Harlan & Hollingsworth Co. *v.* Paschall, 5 Del. Ch. 435 (1882). In the Colony of Massachusetts an ordinance of 1641 extended the title of the adjoining landowners to low-water mark, where the ebb and flow of the tide did not exceed a hundred rods; otherwise title was given to the flats to the extent of a hundred rods from high-water mark. Though the ordinance was annulled by the vacating of the charter under the authority of which it was made, the usage continued and acquired the force of common law. Storer *v.* Freeman, 6 Mass. 435 (1810); Tappan *v.* Boston Water-Power Co., 157 Mass. 24, 31 N. E. 703 (1892). The rule of the Colonial ordinance of 1641, though never extended to Plymouth Colony as a positive law, is nevertheless a settled rule of property in every part of the State of Massachusetts. Barker *v.* Bates, 13 Pick. (Mass.) 255 (1832); Sale *v.* Pratt, 19 Pick. (Mass.) 191 (1837). The Colonial ordinance of 1641 is a part of the common law of Maine. Abbott *v.* Treat, 78 Me. 121, 3 Atl. 44 (1886). In Clement *v.* Burns, 43 N. H. 609 (1862), it was held that the Massachusetts usage extended to New Hampshire.

[13] *Cf.* the doctrine of accretion, and the reasons given for the same in Gifford *v.* Yarborough, 5 Bing. 163 (1828).

[14] In whomsoever the title to the shore may be, there is no doubt that it is held subject to the public easements of navigation and fishery.

[15] The subject may gain title to the shore by prescription and usage. Taking seaweed from the shore, enclosing it from the sea, and the punishment in the manorial court of purprestures committed on the shore, are all evidence, according to Lord Hale, that the shore belongs to the lord of the manor. DE JURE MARIS, c. 6.

loose rules have been adopted with regard to the evidence which will be held sufficient to rebut the presumption of the Crown's title.[16] The principal effect of the presumption is to cast upon the private claimant the burden of proving his adverse title.[17]

As to all fresh-water streams and tidal streams above the ebb and flow of the tide, the rule in England is that title to the soil rests in the riparian proprietors. Here again Lord Hale furnished the lead[18] and the English courts settled the law conformably to his view.[19] In the United States there is a great conflict among the authorities. About half the states accept the rule of the English common law;[20] the others repudiate it as inapplicable to the rivers of this country, and vest the title to navigable rivers in the state.[21] Considerable confusion has been

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[16] Modern usage is admissible to show that the shore is part of the manor, when the limits of the same are not defined by an ancient grant. Beaufort *v.* Swansea, 3 Exch. 413 (1849). Where an ancient grant of a manor does not expressly convey the shore, but gives the right to wreck of the sea, acts of ownership, or of exclusive enjoyment of the shore by the lord of the manor, such as the exclusive taking of sand, stones, and seaweed, or the letting of such right to tenants, may be admitted to prove that the shore is parcel of the manor. Calmady *v.* Rowe, 6 C. B. 861 (1844); Healy *v.* Thorne, Ir. Rep. 4 C. L. 495 (1870); Mulholland *v.* Killen, Ir. Rep. 9 Eq. 471 (1874).

[17] Atty.-Genl. *v.* Richards, 2 Anstr. 603 (1795).

[18] Peck *v.* Lockwood, 5 Day (Conn.), 22 (1811); Gerrish *v.* Proprietors of Union Wharf, 26 Me. 384 (1847). The public right of fishery extends to the taking of shellfish on the shore when dry. Proctor *v.* Wells, 103 Mass. 216 (1869); Parker *v.* The Cutler Milldam Co., 20 Me. 353 (1841). Even though it is necessary to dig up the soil. Peck *v.* Lockwood, *supra;* Weston *v.* Sampson, 8 Cush. (Mass.) 347 (1851); Allen *v.* Allen, 19 R. I. 114, 32 Atl. 166 (1895). But no right exists to carry away the soil itself or dead shellfish embedded therein. Porter *v.* Shehan, 7 Gray (Mass.), 435 (1856); Moore *v.* Griffin, 22 Me. 350 (1843). Nor to attach fixtures to the soil of the shore. Matthews *v.* Treat, 75 Me. 594 (1884). If the public have an easement to go upon the flats and disturb the soil for clams, *a fortiori* they may walk along unenclosed flats for the purpose of fishing in the sea. Packard *v.* Ryder, 144 Mass. 440, 11 N. E. 578 (1887). The taking of seaweed on the shore, however, is not included in the public right of fishery. Gifford *v.* Brownell, 2 Allen (Mass.), 535 (1861); Hill *v.* Lord, 48 Me. 83 (1861); Howe *v.* Stawell, 1 Alcock & N. (Ir.) 348 (1833).

[19] Murphy *v.* Ryan, Ir. Rep. 2 C. L. 143 (1868); Pearce *v.* Scotcher, L. R. 9 Q. B. D. 162 (1882); Duke of Devonshire *v.* Pattinson, L. R. 20 Q. B. D. 263 (1887); Orr Ewing *v.* Colquhoun, L. R. 2 A. C. 839 (1877).

[20] Deerfield *v.* Arms, 17 Pick. (Mass.) 41 (1835); Brown *v.* Chadbourne, 31 Me. 9 (1849); The Norway Plains Co. *v.* Bradley, 52 N. H. 86 (1872); Cobb *v.* Davenport, 32 N. J. L. 369 (1867); Gavit *v.* Chambers, 3 Ohio, 496 (1828); The Washington Ice Co. *v.* Shortall, 101 Ill. 46 (1881); Cruikshanks *v.* Wilmer, 93 Ky. 19, 18 S. W. 1018 (1892); Lorman *v.* Benson, 8 Mich. 18 (1860); State *ex rel.* The Columbia Bridge Co. *v.* Columbia, 27 S. C. 137, 3 S. E. 55 (1887); Jones *v.* The Water Lot Co., 18 Ga. 539 (1855); The Steamboat Magnolia *v.* Marshall, 39 Miss. 109 (1860).

The early decisions in New York were conflicting. Finally in the important case of The People *ex rel.* Loomis *v.* The Canal Appraisers, 33 N. Y. 461 (1865), the court, after an elaborate review of the decisions in New York and elsewhere, held that the rule of the English common law was not applicable to the rivers of this country, and that the Mohawk River and its bed belonged to the state. But in Smith *v.* Rochester, 92 N. Y. 463 (1883), it was held that the effect of the former decision was limited to the Mohawk and Hudson Rivers, and that as regards the other rivers of the state the rule of the common law was in force in New York. The Mohawk and Hudson Rivers belong to the state for the reason that the settlers in the valleys of these rivers derived their titles from the government of the Netherlands and their grants must be construed according to the rules of the civil law prevailing in the Netherlands, by which the grants did not carry title to the beds of navigable streams.

[21] Shrunk *v.* Schuylkill Navigation Co., 14 S. & R. (Pa.) 71 (1826); McManus *v.* Carmichael, 3 Iowa, 1 (1856); People *v.* Gold Run Ditch & Mining Co., 66 Cal. 138,

caused in the American law as the result of an unfortunate *dictum*[22] by Chancellor Kent to the effect that only tidal waters were considered by the English common law to be navigable. This misinterpretation of the English law, which in truth did not give navigability such an arbitrary meaning but recognized the question to be solely one of fact,[23] gained wide currency in this country as a correct statement of the common-law definition of navigable waters. Since as a matter of physical geography most of the navigable waters of England are tidal, it is easy to see how the terms "tidal" and "navigable" came to be used interchangeably with reference to the streams of that country. But such a definition of navigable waters, when applied to the great rivers of this continent, was obviously defective, and the great majority of American courts, including many jurisdictions which recognized the title of riparian owners to the soil of fresh-water streams, rejected it and held that *navigability in fact* alone determined *navigability in law*.[24] The supporters of the English rule as to the ownership of the beds of fresh-water streams urge that it has the advantage of certainty and is easy of application.[25] Moreover, they say, it is not material in whom the nominal title to the stream rests so long as the public easements of navigation and fishing are secure.[26] On the other hand, it is contended that these great passageways of commerce are so important and the public interest in them so paramount that the state should hold the fee.[27] If the question were *res integra* it can hardly be doubted that the law would be settled pretty generally in the United States contrary to the English common-law rule.

On non-navigable streams riparian owners in all jurisdictions hold title *prima facie* to the center of the stream.[28]

In construing grants the authorities are not uniform as to the disposition of soil under waters. Boundaries described as "by," "on," "to," or "along" a stream will, unless restrictive words are used, convey

4 Pac. 1150 (1884); Wood *v.* Fowler, 26 Kan. 682 (1882); St. Louis, Iron Mt. & Southern Ry. Co. *v.* Ramsey, 53 Ark. 314, 13 S. W. 931 (1890); Ravenswood *v.* Flemings, 22 W. Va. 52 (1883); Cooley *v.* Golden, 117 Mo. 33, 23 S. W. 100 (1893); *In re* Minnetonka Lake Improvement, 56 Minn. 513, 58 N. W. 295 (1894); Collins *v.* Benbury, 27 N. C. 118 (1844); Bullock *v.* Wilson, 2 Port. (Ala.) 436 (1835). See Florida *v.* The Black River Phosphate Co., 27 Fla. 276, 328, 9 So. 205 (1891).

[22] "In the case of the Royal Fishery, in the river Banne, it was resolved, that by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil." Palmer *v.* Mulligan, 3 Cai. (N. Y.) 307, 318 (1805).

[23] Pierse *v.* Fauconberg, 1 Burr. 292 (1757); Williams *v.* Wilcox, 8 Ad. & El. 314, 333 (1838); Orr Ewing *v.* Colquhoun, L. R. 2 A. C. 839 (1877). See HALE, DE JURIS MARIS, c. 3. A stream may be tidal and still not navigable. Lynn *v.* Turner, 1 Cowp. 86 (1774); The King *v.* Montague, 4 B. & C. 598 (1825).

[24] McManus *v.* Carmichael, *supra;* The Daniel Ball, 10 Wall. (U. S.) 557 (1870); Fulmer *v.* Williams, 122 Pa. 191, 15 Atl. 726 (1888).

[25] Cobb *v.* Davenport, 32 N. J. L. 369 (1867).

[26] Smith *v.* Rochester, *supra;* Lorman *v.* Benson, *supra.*

[27] Barney *v.* Keokuk, 94 U. S. 324, 338 (1876); Ravenswood *v.* Flemings, *supra.* Of the states which limit the title of the riparian owner along navigable streams to the bank, some fix the boundary at the line of high water, others at low water, while still others choose the edge of the water at its ordinary height.

[28] The Barclay R. & Coal Co. *v.* Ingham, 36 Pa. St. 194 (1860); Hubbard *v.* Bell, 54 Ill. 110 (1870); St. Paul & Pac. R. R. Co. *v.* Schurmeir, 7 Wall. (U. S.) 272 (1868). See Welles *v.* Bailey, 55 Conn. 292, 316, 10 Atl. 565 (1887).

title toward the center of the stream as far as the grantor owns.[29] When the lands conveyed are bounded, not by the water, but by the "shore," "beach," "coast," "bank," or similar designation, the soil under the water is usually excluded.[30] But the cases are in conflict as to whether the shore is included in such a grant. Some courts construe the deed as conveying title to the low-water mark if the grantor owns so far,[31] others exclude the shore and fix the boundary at high-water mark. A recent Canadian case, *Esquimalt & Nanaimo Ry. Co.* v. *Trent*,[32] follows the view which fixes the boundary at high-water mark. The same reasons, however, which support the widely accepted construction under which grants of lands bounded by waters convey title to the center of the stream should apply with equal force in favor of a rule which gives the grantee title to the low-water mark.

CONTROL OF EXECUTIVE OFFICERS BY *MANDAMUS*. — A writ of *mandamus* is one issuing in the name of the sovereign to an inferior tribunal, corporation, board, or person, commanding the performance of an act which the law enjoins as a duty attaching to an office or trust.[1] It is an extraordinary remedy to be resorted to only in the absence of other adequate legal remedy.[2] It is to be distinguished from the preventive writ of injunction,[3] and the reviewing writ of *certiorari*.[4]

The general principles governing the issuance of the writ are well defined, but their application gives rise to considerable difficulty. The writ issues only in the sound discretion of the court,[5] but this discretion

[29] Paine *v.* Woods, 108 Mass. 160 (1871); Agawam Canal Co. *v.* Edwards, 36 Conn. 476 (1870); Ballance *v.* Peoria, 180 Ill. 29, 54 N. E. 428 (1899); Partridge *v.* Luce, 36 Me. 16 (1853). "Without adhering rigidly to such a construction, water gores would be multiplied by thousands along our inland streams, great and small, the intention of the parties would be continually violated, and litigation would become interminable." Luce *v.* Carley, 24 Wend. (N. Y.) 450 (1840).

[30] Starr *v.* Child, 20 Wend. (N. Y.) 149 (1838). *Contra*, Sleeper *v.* Laconia, 60 N. H. 201 (1880).

[31] Lamb *v.* Rickets, 11 Ohio, 311 (1842); Halsey *v.* McCormick, 13 N. Y. 296 (1855); Murphy *v.* Copeland, 58 Iowa, 409, 10 N. W. 786 (1882); Brown Oil Co. *v.* Caldwell, 35 W. Va. 95, 13 S. E. 42 (1891).

[32] [1919] 3 W. W. R. 356. More *v.* Massini, 37 Cal. 432 (1869); Galveston City Surf Bathing Co. *v.* Heidenheimer, *supra;* Brown *v.* Heard, 85 Me. 294, 27 Atl. 182 (1893); Litchfield *v.* Ferguson, 141 Mass. 97, 6 N. E. 721 (1886). But a consideration of the whole instrument may show that the word "shore" was used in a popular sense, importing the land as far as low-water mark. Hathaway *v.* Wilson, 123 Mass. 359 (1877).

[1] Cincinnati, etc. Co. *v.* Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033 (1900); Chicago, etc. R. Co. *v.* Crane, 113 U. S. 424, 432 (1889). For leading cases on the definition and history of *mandamus*, see McBride *v.* Grand Rapids, 32 Mich. 360 (1875); State *v.* Gibson, 187 Mo. 536, 86 S. W. 177 (1901); Chumasero *v.* Potts, 2 Mont. 242 (1875); State *v.* Marks, 6 Lea (Tenn.), 12 (1880). See also People *v.* Steele, 2 Barb. (N. Y.) 397, 416 (1851). See HIGH, EXTRAORDINARY REMEDIES, § 1; 2 POTTER, CORP., § 634.

[2] Duke *v.* Turner, 204 U. S. 623, 631 (1906); *In re* Rice, 155 U. S. 396, 403 (1894).

[3] Matter of Rooney, 26 Misc. 73, 56 N. Y. Supp. 483 (1899); Feltcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683 (1894).

[4] Hayes *v.* Morgan, 81 Ill. App. 665 (1898); Gibbs *v.* Commissioners, 19 Pick. (Mass.) 298 (1837); People *v.* Barnes, 114 N. Y. 317, 20 N. E. 609 (1889); Jones *v.* Allen, 13 N. J. L. 97 (1832); State *v.* Elliott, 108 Wis. 163, 84 N. W. 149 (1900).

[5] People *v.* Olsen, 215 Ill. 620, 74 N. E. 785 (1905); McCarthy *v.* Boston St. Comm., 188 Mass. 338, 74 N. E. 659 (1905); Gleistman *v.* Town of West New York, 74 N. J. L.